

**ETHICS COMMISSION
CITY AND COUNTY OF HONOLULU**



ADVISORY OPINION NO. 109

The question is whether two members of the City Council [Council], one of whom owns large tracts of unimproved real property [URP], and another who is an employee of a corporation which owns large tracts of URP, are required to file with the Council a written disclosure of conflict of interest before they vote on the adoption of real property tax rates for residential property.

The Ethics Commission's [Commission's] answer is no.

The salient facts which gave rise to the question are:

1. A member of the Council has a partial interest in several large parcels of URP and is an officer in a corporation which owns several large parcels of URP.
2. Another member of the Council is an employee of a corporation which owns several large parcels of URP.
3. The Council, empowered to set real property tax rates under Section 8-11.1(b), Revised Ordinances of Honolulu 1978 (1980 Supp.) [ROH], adopted a resolution setting tax rates for residential real property.
4. Both members voted to adopt the resolution setting the tax rate for eight classes of real property, which includes residential real property.

Section 11-103, Revised Charter of the City and County of Honolulu 1973 (1979 Supp.) [RCH], states in pertinent part that any member of the Council who:

[P]ossesses or who acquires such interests as might reasonably tend to create a conflict with the public interest shall make full disclosure in writing. . . to the council. . . and to the ethics commission, at any time such conflict becomes apparent. Such disclosure statements shall be made a matter of public record and be filed with the city clerk. Any member of the council who knows he has a personal or private interest, direct or indirect, in any proposal before the council, shall disclose such interest in writing to the council. Such disclosure shall be made a matter of public record prior to the taking of any vote on such proposal.

Under the foregoing cited provisions and facts, the threshold issue is whether the setting of real property tax rates is a legislative act or a quasi-judicial act by the Council. The Commission is of the opinion that it is a legislative act. Therefore, no disclosure is required.

Request for advisory opinions by members of the Council have been made to the Department of the Corporation Counsel relative to the same issue in this case, but this request for an advisory opinion is the first that this Commission has received regarding the same issue. In response to the requests of the Council, the Department of the Corporation Counsel has issued Opinion No. 66-7 [Op. No. 66-7] and Memorandum of Law No. 79-19 [M79-19], copies of which are enclosed for examination. A review of the facts of this case indicates that the statements of law, rationale, and conclusions contained in Op. No.66-7 and M 79-19 are applicable to this case.

The test that is applicable to determine whether or not the Council acted in a quasi-judicial capacity or in a legislative capacity was stated by the Virginia State Supreme Court in *Blankenship v. City of Richmond*, 49 S.E. 2d 321, 323-324 (Va. 1948), as follows:

In general, it may be said that such a body acts in a quasi-judicial capacity when it grants or denies a privilege or benefit, and in a legislative capacity when it prescribes a course of conduct.

. . . .

An ordinance that regulates or restricts the use of property regulates or restricts conduct with respect to that property and is purely legislative.

See also *Schauer v. City of Miami Beach*, 112 So.2d 838 (Fla. 1959). The foregoing cases were cited in Op. No. 66-7 and M 79-19.

Based on the foregoing test in Op. No.66-7, the Department of the Corporation Counsel concluded that:

The Commission is inclined to view the consideration and adoption of the comprehensive zoning ordinance as a legislative, and not judicial or quasi-judicial, function of the Council. The ordinance certainly proposes regulations covering a wide range of activities and areas and imposes broad policy restrictions on zoning throughout the island. It does not take on the character of a judicial act, in that it does not concern itself with the establishment of particular facts relating to a specific parcel of land for which benefits are sought. [At 5]

Similarly, in M 79-19 the Department of the Corporation Counsel opined that:

[A] member of Council is not required to disclose his interest which may be enhanced by the enactment of an ordinance which prescribes general conduct with respect to use of property. . . and issuance of building permits . . . because the Council is acting in a legislative capacity. Examples of the Council acting in a judicial or quasi-judicial capacity are when the Council enacts ordinances rezoning a single lot or, in the case of the Building Code, the Council cannot act in a judicial or quasi-judicial capacity because it has delegated such functions to the Building Board of Appeals. With respect to voting on a particular bill, if such bill meets the criterion regulating general conduct, rather than granting of a privilege or benefit, a member of the Council has a right to vote as prescribed in RCH Section 3-108.1. [At 5]

An example of a quasi-judicial act by the Council involves the following facts:

1. Council has a bill for third reading to rezone a 650-acre single parcel of land from agricultural to residential.
2. This single parcel of land is owned by a corporation which employs a member of the Council.
3. If the subject bill is passed on third reading and approved by the Mayor, the corporation can subdivide the property into residential lots. Thus, the corporation is benefited by the action of the Council.
4. The member of the Council employed by the corporation must file a written disclosure with the Council and such disclosure must be made public before any action is taken by the Council on the subject rezoning bill.

An example of a legislative act by the Council involves the following facts:

1. A member of the Council purchases one of the subdivided residential lots in the above example.
2. There is a bill before the Council for third reading, rezoning 30 acres of the now residentially-zoned 650 acres to commercial, for a regional shopping center.
3. Within the 30-acre proposed commercial zone, there are approximately 150 residential lots, one of which is owned by a member of the Council.

4. The Council adopts the said bill on third reading and the Mayor approves. The residential lots which were rezoned to commercial have increased in value. As such, the member of the Council who owns a residential lot is benefited.

5. The residential lots within the 30-acre site were rezoned regardless of who happened to be an owner of a residential lot. In other words, the residential lots within the 30-acre site were rezoned regardless of ownership, but by virtue of their location. Thus, residential lots similarly situated received the same benefit.

When an analysis is made of the two examples, the Commission notes that the quasi-judicial act of the Council generally confers a benefit on a specific property by Council action. In contrast thereto, in the example of legislative act of the Council so long as the residential property is within the boundary of the 30-acre proposed site, any residential lot is rezoned to commercial. In other words, any residential lots similarly situated will be reclassified commercial.

When the foregoing criteria are applied to the setting of real property tax rates by the Council, the Commission is of the opinion that such action is legislative. The action of the Council set the real property tax rates for eight classes of real property. One of the classes is residential real property. The tax rates for the eight classes of real property were set when the resolution was adopted. Such action by the Council established the eight classes of real property and at the same time set the tax rate for each class. In other words, if a real property has been zoned for a certain use, then it falls within one of the eight classes and applicable tax rate. Thus, benefit to residential real property owners was conferred generally to any residential real property. Accordingly, the Commission concludes that the subject Council members did not have to file a disclosure with the Council before they voted on the resolution.

Caveat: Incidentally, if the subject Council members were required to file a disclosure because they may have benefited directly or indirectly from the lower real property tax rate, other members of the Council who own residential real property or condominiums/apartments would have to file a disclosure even though it was their home. Such disclosure would have been required because there were two separate real property tax rates, one for residential real property and the other for the improvements or homes thereon. There was no distinction between unimproved or improved residential real property for the tax rate to apply. Moreover, the members of the Council who own residential real property with homes or condominiums/apartments thereon also benefited by the lower real property tax rate. Because of such ramifications, the Commission believes the courts have differentiated between legislative and quasi-judicial acts of a legislative body.

To summarize, the Commission concludes that since the setting of real property tax rates is a legislative act by the Council, the subject Council members were not required to file a disclosure with the Council as prescribed in Section 11-104, RCH. The action of the Council was legislative because the residential real property tax rate was conferred upon residential real property regardless of ownership or location so long as it was zoned residential.

Dated: September 29, 1982

ETHICS COMMISSION

Mazeppa K. Costa, Chairperson